(2)

No. 90-1299

Supreme Court, U.S.
FILED
MAR 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 18, 1991

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QUESTION PRESENTED FOR REVIEW

Respondents contend that the only question presented for review is as follows:

1. Did the United States Court of Appeals for the Seventh Circuit have the authority to reapportion liability in this admiralty collision case on the ground that, as a matter of law, the district court's detailed findings of fact would not support an apportionment of more than two-thirds of the liability to Respondents.

Respondents do not believe that other elements set forth in Question No. 1 in the Petition (Pet. i), i.e., making new findings of fact (other than reapportionment) and reweighing the evidence, occurred or are in question, or that Question No. 2 in the Petition (Pet. i) is relevant.

LIST OF ALL PARTIES TO THE PROCEEDING

The list of parties set forth in the Petition (Pet. ii and iii) is true and correct.

The following Respondents have parent corporations:

1. Allstate Insurance Company is a wholly owned subsidiary of Sears, Roebuck & Co.

2. Highlands Insurance Company is owned by Halliburton Company.

3. Insurance Company of North America, U.K. Ltd. "G" A/o is owned by CIGNA Corporation.

4. Insurance Company of North America, U.K. Ltd. "O" A/o is owned by CIGNA Corporation.

As far as in known, the balance of the Respondent corporations are independent entities.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

I. STATUTES INVOLVED 1

II. STATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Course of Proceedings 3

C. District Court Decision 3

D. Court of Appeals Decision 4

III. STATEMENT OF FACTS 4

IV. SUMMARY OF ARGUMENT 7

V. ARGUMENT 8

A. Introduction 8

B. The District Court Erroneously Apportioned Liability in Proportion to Damages Alleged In Pleadings 9

C. The Court of Appeals Correctly Prescribed Limits for Apportionment of Liability as a Matter of Law 10

1. The Court of Appeals Had the Power to Modify 10

2. The Court of Appeals' Decision to Reapportion Liability Turned on a Question of Law, Not on a Finding of Fact 12

TABLE OF CONTENTS – Continued

Page

D. The Court of Appeals Was in as Good a Position to Evaluate the Record as Was the District Court 16

1. Both Apportionment and Reapportionment Were on a Cold Record 16

2. "May She Rest in Peace" 17

E. There is No Deprivation of the City's Right to Appeal 18

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Page

Federal Cases

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).....10, 12

Armco, Inc. v. Armco Burglar Alarm Co, Inc., 693 F.2d 1155 (5th Cir. 1982)..... 11

Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986)..... 12

Baumgartner v. United States, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944)..... 11

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 516 F.2d 172 (2nd Cir. 1975); (En Banc), *rev'd on other grounds*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), *reh'g denied*, 430 U.S. 976, 97 S.Ct. 1668, 52 L.Ed.2d 371 (1977).....13, 18

Complaint of Paducah Towing Co., 692 F.2d 412 (6th Cir. 1982) 10

Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir. 1985) 11

Felder v. United States, 543 F.2d 657 (9th Cir. 1976) 13, 15, 18

Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987).....13, 15

Higginbotham v. Mobile Oil Corp., 545 F.2d 422 (5th Cir. 1977) 11

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986)..... 12

Matton Oil Transfer Corp. v. The Dynamic, 123 F.2d 999 (2nd Cir. 1941)..... 17

TABLE OF AUTHORITIES – Continued

Page

Parts and Electric Motors, Inc. v. Sterling Electric Inc., 866 F.2d 228 (7th Cir. 1988) 12

Petition of United States Steel Corporation, 479 F.2d 489 (6th Cir. 1973), cert. denied, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973) 16

Power v. Union Pacific Railroad Co., 655 F.2d 1380 (9th Cir. 1981) 11

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) 10, 12, 13

Southern Illinois Stone Co. v. Universal Engineering, 592 F.2d 446, 451 (8th Cir. 1979) 11

United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) 15

United States v. Singer Manufacturing Co., 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963) 11

United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948), reh'g. denied, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948) 11

UNITED STATES CODE

28 U.S.C. § 2106 ..... 1, 10, 20

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52(a) 1, 10, 11, 13, 16

OTHER AUTHORITIES

5 Moore's Federal Practice, Para. 52.06[1], p. 51-151 (1990) 17

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

I. STATUTES INVOLVED

In addition to Fed. R. Civ. P. 52(a), Findings by the Court (Pet. 3), there is involved 28 U.S.C. § 2106 as follows:

> § 2106. **Determination**
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order,

or require such further proceedings to be had as may be just under the circumstances.

II. STATEMENT OF THE CASE

The statement of the case in the Petition (Pet. 3-10) is incomplete. It omits a number of necessary facts for consideration. and contains a substantial amount of argument. Consequently, Respondents will restate the case.

A. Nature of the Case

This case arises out of the sinking of the S/S E.M. FORD in a storm during the afternoon and evening of December 24, 1979. Respondents are the owner and the hull and cargo insurers of the ship (hereinafter collectively "Shipowner"). Petitioner is the City of Milwaukee (hereinafter "City") at whose dock, i.e., Terminal No. 1 in South Slip No. 1 in the outer harbor at the Port of Milwaukee, the ship was moored when the storm arose. Shipowner seeks recovery from the City for the damages incurred by the ship and its cargo, alleged in the Complaint to be $6.5 million, claiming that the City breached its obligations as a wharfinger by assigning the dock at which the FORD was laid up, when the City knew that the dock and slip were peculiarly vulnerable to a storm such as arose on December 24, 1979, and by failing to warn as to the dangers about which it knew, and that the City breached its warranty to provide a safe berth. The City denied fault and alleged contributory negligence on the part of the Shipowner, counterclaiming for damage to its dock and seawall in the alleged sum of $250,000.

B. Course of Proceedings

Shipowner commenced this action in admiralty on October 29, 1980, ten months after the disaster, and the City was served on November 3, 1980 (Pet. App. 17a). The City filed an Answer and Counterclaim on January 15, 1981 (Pet. App. 17a-18a). By verbal order at a Status Conference held on December 16, 1981, trial of the case was ordered bifurcated as to the issues of liability and damages (Pet. App. 19a). From early 1981 through most of 1983, the parties conducted extensive discovery, but only on the issue of liability.

The issue of liability was tried to the district court in admiralty from January 6, 1986, through January 24, 1986 (Pet. App. 19a-20a). The district court entered its Interlocutory Judgment (styled "Memorandum of Decision and Order") on June 30, 1989 (Pet. App. 15a-144a).

C. District Court Decision

Essentially, the district court held that the Shipowner was free from any statutory faults, but was negligent and at fault for laying up the FORD at Terminal No. 1 in South Slip No. 1, for failing to employ or retain aboard a standby master or pilot and crew members who could navigate the vessel, for failing to maintain ship-to-shore radio-telephone communications, and for failing to monitor the weather (Findings 67 and 68, Pet. App. 58a-59a). It held the City to be negligent and at fault for allowing the FORD to temporarily lay up at Terminal No. 1 in South Slip No. 1 for a period of days, for failing to warn the ship that wind and wave conditions could develop which would endanger the vessel and the City's property, for

failing to order the ship to remain manned or move off the berth (Findings 65 and 66, Pet. App. 57a-58a), and for breach of its warranty to provide a safe berth (Finding 72, Pet. App. 59a). The district court apportioned 96% of the negligence and fault to the Shipowner and 4% of the negligence and fault to the City on the basis that the Shipowner had the costlier property at risk with the reasonable result being that the damages claimed by the Shipowner (in its Complaint) would be 26 times as great as those claimed by the City (in its Counterclaim) (Pet. App. 138a-139a).

D. Court of Appeals Decision

Appeal was taken by the Shipowner to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals entered its Decision and Judgment on October 16, 1990 (Pet. App. 1a-14a). It held that the 96/4 apportionment of liability by the district court between the Shipowner and the City was clearly erroneous because the Court of Appeals, upon review of the record, was left with a clear conviction that the district court had made a mistake (Pet. App. 11a). The Court of Appeals reapportioned liability between the Shipowner and the City on a 2/3-1/3 basis, holding that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner (Pet. App. 11a-13a).

III. STATEMENT OF FACTS

The Shipowner is and was the owner and operator of the S/S E.M. FORD (Pet. App. 25a-26a). The FORD was a

self-unloading, bulk cement carrier, 413.67 feet in length and 50 feet in breadth, powered by a 1500 h.p. engine (Pet. App. 27a). The City is a Wisconsin municipal corporation which owned, operated and furnished for payment docks, wharves, piers and vessel berths in the harbor of Milwaukee, including the vessel berth at Terminal No. 1 in South Slip No. 1 (Pet. App. 27a). The City employed Stanley Blawas as its Dock Superintendent (Pet. App. 27a). He had authority to offer berths at City docks in the Port of Milwaukee to vessels (Pet. App. 30a).

In mid-November 1979, the Shipowner entered into a written contract with the City for the winter layup of the S/S E.M. FORD at Terminal No. 4 in South Slip No. 3 in Milwaukee's outer harbor (Pet. App. 29a-30a). At that time and in connection with that contract, Blawas assured the Shipowner that Terminal No. 4 in South Slip No. 3 was a safe, winter layup berth (Pet. App. 30a). Five weeks later, on December 21, 1979, as the FORD was approaching the Port of Milwaukee carrying a cargo of bulk cement, the Shipowner decided that the ship would lay up at the Shipowner's terminal in Milwaukee's inner harbor for the winter, but would moor temporarily at Terminal No. 4 in the South Slip No. 3 to wait for another vessel to precede her to the Shipowner's terminal and unload before the FORD could go to the Shipowner's terminal to lay up for the winter (Pet. App. 32a-33a).

Following that decision and as the FORD was still approaching Milwaukee, the ship's Master, Capt. Gallagher, talked on the radio-telephone with Blawas and told him about the change in plans. Blawas offered to let the FORD tie-up temporarily at Terminal No. 1 in South Slip No. 1, which was a slip similar to South Slip No. 3

but more conveniently located (Pet. App. 33a-34a). Both slips were in the outer harbor and just a short distance from each other. Capt. Gallagher agreed to that arrangement and when the FORD arrived, she proceeded to Terminal No. 1 in South Slip No. 1 where she moored at the dock (Pet. App. 34a).

Early the next morning, i.e., on December 22, 1979, the FORD's orders were changed again and Capt. Gallagher was instructed to lay up the ship temporarily where it was and send most of the crew home for Christmas (Pet. App. 40a), leaving just five men aboard to keep the boiler going so that the ship would remain warm and would be ready for use when the men arrived back after the Christmas vacation (Pet. App. 42a-43a). Blawas came aboard the ship that morning and while there conferred with Capt. Gallagher. They talked about the captain's orders, about the fact that most of the ship's crew were going home for Christmas and about the berth where the vessel was tied up (Pet. App. 41a). Blawas stated that the outer harbor could get "heavy" if a storm came up, but when questioned by Capt. Gallagher as to whether there was any problem in leaving the FORD there, he predicted "that the waves in South Slip No. 1 would not exceed one-to-two feet" (Pet. App. 101a). At the time that was said, the City had superior knowledge that dangerous conditions could develop in South Slip No. 1 because it had records of daily wave heights back to 1958, which included occasional wave heights in South Slip No. 1 of 8 to 10 feet, and knew that outer harbor slips were not suitable for winter moorings (Pet. App. 115a). Relying on Blawas' representation, Capt. Gallagher determined to leave the FORD in temporary layup at that

location (Pet. App. 102a). Later that day the crew left the ship for the Christmas holidays, except for the five men left behind to man the temporary layup (Pet. App. 42a).

Two days later, i.e., on December 24, 1979, beginning at about noon, a storm occurred over Lake Michigan and at the Port of Milwaukee. Sizable waves developed in South Slip No. 1, eventually reaching heights of 10-15 feet. The FORD broke away from the dock in the afternoon and over the course of a number of hours pounded the seawall at the inner end of the slip. Late in the evening she sank in the middle of the slip, despite heroic efforts to save her on the part of the five men who were aboard the ship, along with a temporary port captain who was hired by the Shipowner and some land-based personnel of a shoreside contractor (Pet. App. 51a-55a).

IV. SUMMARY OF ARGUMENT

In its lengthy Decision containing extensive and detailed findings of fact, the district court apportioned liability between the Shipowner and the City on a 96/4 basis on the ground that, because the Shipowner had the costlier property at risk, the foreseeable result was that the damages claimed by the Shipowner in its Complaint ($6.5 million) would be 26 times as great as the damages claimed by the City in its Counterclaim ($250,000), so that the Shipowner was 26 times as negligent as the City. Since there is no evidence in the record of property valuations or damages to either of the parties and there is no statutory or case law to substantiate an apportionment of liability on the basis of alleged damages, the Court of

Appeals was left with a definite and firm conviction that a mistake had been committed by the district court. Pursuant to its statutory power and applicable case law, and upon full review of the record, the Court of Appeals concluded, as a matter of law, that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner. Accordingly, the Court of Appeals modified the district court's finding of fact as to liability in accordance with what it considered to be the outer limits of the discretion of any reasonable trier of fact, apportioning two-thirds of the liability to the Shipowner and one-third of the liability to the City. Because the decision of the Court of Appeals' turned on a question of law, rather than on a finding of fact, and because the record was equally as "cold" for the district court to decide apportionment as it was for the Court of Appeals to review it, the Court of Appeals was in no worse position than the district court to evaluate the record and apportion liability. The City exercised its right to appeal the reapportionment in its Petition for Rehearing to the Court of Appeals which was unanimously denied.

V. ARGUMENT

A. Introduction

"May she rest in peace," concluded the United States Court of Appeals for the Seventh Circuit in its unanimous Decision reversing the district court as to apportionment of liability (Pet. App. 13a). By the time the United States Supreme Court considers the City's Petition, we will be eleven years and three months after the disaster of

December 24, 1979, and ten years and five months after the lawsuit was commenced. Whatever the ship may be doing, the case is not resting, much less resting in peace; and the fact remains that the parties have not yet even discovered, much less tried, the issue of damages.

B. The District Court Erroneously Apportioned Liability in Proportion to Damages Alleged in Pleadings

The Decision of the district court (Findings No. 70 and 71, Pet. App. 59a) apportioned liability between the Shipowner and the City in direct proportion to damages alleged in the Complaint (for the Shipowner) and the Counterclaim (for the City) on the ground that, because the Shipowner had the costlier property at risk, the foreseeable result was that the damages claimed by the Shipowner would be 26 times as great as those claimed by the City (as dock owner) and therefore the Shipowner was 26 times as negligent as the City, giving rise to the 96/4 apportionment of liability between the two (Pet. App. 138a-139a). This flew in the face of the fact that the damage issue was bifurcated and had not even been the subject of discovery, much less trial. There is no evidence in the record as to the value of any property involved in this matter, even including the ship, so there is no basis for the Court's statement that the Shipowner had the costlier property at risk. There is absolutely no evidence of damages in the record. There is no statutory or case law to substantiate an apportionment of liability on the basis of alleged damages resulting from an accident. It is clear that the district court's apportionment of damages, based upon either property valuation or alleged damages

incurred by the parties, or both, was erroneous in that it had neither legal nor factual foundation.

C. The Court of Appeals Correctly Prescribed Limits for Apportionment of Liability as a Matter of Law

1. The Court of Appeals Had the Power to Modify

28 U.S.C. § 2106 authorizes appellate courts to modify judgments brought before them for review or to remand to the trial court for further appropriate proceedings. With regard to findings of fact made by a court sitting without a jury, that grant of authority is limited by Fed. R. Civ. P. 52(a). Under Rule 52(a), the appellate court may not set aside the court's findings "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City, N.C*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The appellate court is not bound by the trial court's view of the law. *Complaint of Paducah Towing Co.*, 692 F.2d 412, 422, (6th Cir. 1982).

The numerous cases discussing the applicability of the "clearly erroneous" rule speak of pure questions of fact, pure questions of law, questions of subsidiary fact, and questions of ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66

(1982). In the last category there are sub-sets for pure facts which are merely ultimately decisive and for those which "clearly impl[y]" the application of standards of law. *Baumgartner v. United States*, 322 U.S. 665, 671, 64 S.Ct. 1240, 1244, 88 L.Ed. 1525 (1944). It is this last category of "legally derived ultimate facts" which must concern us here.

It has long been held that findings of fact derived from a trial court's misapprehension or erroneous conception of law are subject to modification by the appellate court without need for remand to the trial court. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), reh'g. denied, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9, 83 S.Ct. 1773, 1784 n.9, 10 L.Ed.2d 823 (1963). When a trial judge's finding of fact is tainted by misapprehension or erroneous conception of controlling legal principles, review of the evidence by the appellate court is free from the constraints of the "clearly erroneous" rule. *Higginbotham v. Mobile Oil Corp.*, 545 F.2d 422, 426, 433 (5th Cir. 1977); *Southern Illinois Stone Co. v. Universal Engineering*, 592 F.2d 446, 451 (8th Cir. 1979); *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1162 (5th Cir. 1982); *Power v. Union Pacific Railroad Co.*, 655 F.2d 1380, 1383 (9th Cir. 1981); *Cuddy v. Carmen*, 762 F.2d 119, 124 (D.C. Cir. 1985).

The Petitioner's statement of the law with regard to application of the Rule 52(a) "clearly erroneous" standard is generally correct. Appellate courts are not entitled to retry cases on the facts. Indeed, the Seventh Circuit has enunciated what may some day be referred to as the

"dead fish" rule which makes the point in particularly pungent terms:

> "To be clearly erroneous a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *rehearing denied, cert. denied* ___ U.S. ___, 110 S.Ct. 141, 107 L.Ed. 2d 99 (1989).

However, appellate courts should and must make a "clearly erroneous" determination based on the "entire evidence in the record." *Bazemore v. Friday*, 478 U.S. 385, 403-404, 106 S.Ct. 3000, 3010, 92 L.Ed.2d 315 (1986).

2. The Court of Appeals' Decision to Reapportion Liability Turned on a Question of Law, Not on a Finding of Fact

Contrary to the City's assertions (Pet. 11) in this case, the Court of Appeals has not violated an "elementary" rule nor has it proceeded in a fashion which this Court has described as "incredible" nor does its decision conflict with prior decisions of this Court. Rather, the Court of Appeals perceived what Petitioner apparently has not. The district court's finding was not purely a matter of fact. It was a finding based upon a misapprehension or erroneous conception of the underlying law. As such, it is not governed by the decisions in *Anderson v. Bessemer City, N.C., supra; Pullman-Standard v. Swint, supra,* or *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986).

While Rule 52(a), and cases decided thereunder, normally would require remand for new fact-finding where pure fact is involved, exceptions have long been recognized where the trial court's error derives from an erroneous view of the law and where no further fact-finding is necessary. *Pullman-Standard, supra,* 456 U.S. at 292; *Hellenic Lines, Ltd. v. Prudential Lines, Inc.,* 813 F.2d 634, 638 (4th Cir. 1987); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172, 186 (2nd Cir. 1975); (En Banc), *rev'd on other grounds,* 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), *reh'g denied,* 430 U.S. 976, 97 S.Ct. 1668, 52 L.Ed.2d 371 (1977); *Felder v. United States,* 543 F.2d 657, 671 (9th Cir. 1976).

It is important to keep in mind that here the Court of Appeals found the district court's extensive opinion and detailed findings of fact to be largely well reasoned, correct in finding that both the City and Shipowner were at fault and correct in finding that the Shipowner was more at fault than the City. (Pet. App. 10a) Out of a district court opinion of 144 pages, the Court of Appeals in effect modified one, and only one, finding, i.e., apportionment of liability between the parties. Then, using the correct formulation of the law of comparative negligence[1]

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[1] The City's argument relating to apportionment by cost of avoidance is a "red herring." The Court of Appeals mentioned the cost-of-avoidance concept as a basis for assessing culpability of each party (Pet. App. 11a) and determined that no unusual measures or costs would have been necessary for either the City or the Shipowner to avoid the loss. (Pet. App. 12a) With hindsight, the Court of Appeals' language regarding "distribution of the cost of avoidance" (Pet. App. 12a) could

(Continued on following page)

and the same facts as utilized by the district court, the Court of Appeals, within narrowly prescribed bounds, reallocated liability, not as a new finding of fact but as a matter of law that the most liability against the Shipowner which the facts could support would be two-thirds. In short, no additional fact-finding was necessary and remand to the district court not only would have been wasteful, but would have extended the history of this case further into its second full decade.

The device which allowed the Court of Appeals to achieve this judicial economy was its conclusion that "on the facts of this case, no reasonable trier of fact could apportion more than two thirds of the liability to National Gypsum." (Pet. App. 11a.) That was a legal conclusion, not a finding of fact. On the same facts as found by the district court, but now applying the correct underlying law, the Court of Appeals modified the finding of legally derived ultimate fact. It held *as a matter of law,* not that it would have decided the case differently, but rather that, applying the correct legal principle, upon remand the district court could not reasonably find the

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(Continued from previous page)

have been more precise. The court was really comparing the *opportunities* for avoidance. In so comparing, the Court of Appeals found that both the City and the Shipowner had an equal opportunity to avoid the loss prior to the berthing of the E. M. FORD. However, after the berthing, in the view of the Court of Appeals, the Shipowner had the only real opportunity. Thus, the Shipowner had two opportunities and the City had one, and the Court of Appeals held that *no reasonable trier of fact could apportion more than two thirds of the liability to the Shipowner.* Cost was not a factor.

Shipowner to be more than two-thirds liable. Based on this legal conclusion one may presume that the Court of Appeals would reverse and remand any subsequent judgment apportioning to the Shipowner a greater share of liability than two-thirds. Consequently, the Court of Appeals concluded that remand to the district court would be an empty and time-consuming gesture and reapportioned liability at the outer limits of the district court's discretion, i.e. two-thirds/one-third.[2] This is a familiar and time honored exercise of appellate administration. In *Chris-Craft Industries, supra,* where the district court had applied an improper legal standard in defining the measure of damages, the court of appeals modified in the same manner as was done in this instance. In formulating the correct measure of damages to be used and modifying the award (from $1,673,988 to $25,793,365), the court stated that its "upper limit is the minimum amount that the district court *could have awarded without committing reversible error,*" 516 F.2d at 187, emphasis added. In *Felder v. U.S., supra,* the Court of Appeals found that damages were incorrectly awarded based on an error in law. Using the findings of the district court, the Court of

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[2] Contrary to the City's implication (Pet. 19, n.6), the decision in *Hellenic Lines, Ltd. v. Prudential Lines, Inc., supra,* is no aberration in light of *United States v. Reliable Transfer Co., Inc.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). *Reliable Transfer* merely abrogated the divided damages rule in cases of marine collision involving mutual fault, except where the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. The principles guiding appellate courts in their treatment of trial court findings are universal in application and not limited to cases in admiralty or cases of collision.

Appeals changed the awards "only to the extent necessary *to bring them within an acceptable range.*" 543 F.2d at 671, emphasis added. In *Petition of United States Steel Corporation,* 479 F.2d 489 (6th Cir. 1973), cert. denied, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973), the appellate court modified damage awards, rather than remanding to the trial court again. The Court of Appeals stated that it could *"only modify to that maximum amount of damages which could have been awarded by the district court without constituting reversible error."* 479 F.2d at 501, emphasis added.

The Court of Appeals in this case noted that, though it had discretion to remand to the district court, it determined not to do so. (Pet. App. 11a) Aside from its determination that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner, there are other reasons of judicial economy and justice which, though not enunciated by the Court of Appeals, may have influenced its decision. The deference to a trial court's findings prescribed by Rule 52(a) is based primarily on the trial court's superior ability to judge credibility of witnesses and weigh the likelihood of disputed facts. The principle does not apply here. Instead, the Court of Appeals held as a matter of law that the facts found by the district court could not support a finding of more than two-thirds liability on the part of the Shipowner.

D. The Court of Appeals Was in As Good a Position to Evaluate the Record As Was the District Court

1. Both Apportionment and Reapportionment Were On a Cold Record

This case was tried in January of 1986, five years before the district court would have had an opportunity

upon remand to review its finding of liability apportionment. The district court's original decision had been issued in June of 1989, three-and-one-half years after that court had tried the case. Indeed, a review of the district court's decision indicates that it was prepared almost wholly based upon a transcript of the trial, transcripts of depositions and documentary evidence, as opposed to the recollections or notes of the district court. It is a fair assumption that the trial transcript was prepared for the sole purpose of refreshing the recollection of the district court because of the passage of time. The record was as cold for the district court as it would be for the Court of Appeals.

The decision of the district court contains an exhaustive discussion of the facts and is certainly more complete than the "brief, pertinent findings in respect to contested matters" required by Rule 53(a). *Matton Oil Transfer Corp. v. The Dynamic*, 123 F.2d 999, 1001 (2nd Cir. 1941); 5 Moore's Federal Practice, Para. 52.06[1], p. 52-151 (1990). Thus, the Court of Appeals was as well equipped to make its own review of the facts as was the district court.

With the exception of its finding regarding allocation of liability, the district court's findings of fact were accepted and approved by the Court of Appeals. Hence, credibility and demeanor of witnesses were in no way significant to the modification made by the Court of Appeals.

2. "May She Rest in Peace"

Finally, and of great significance, is the age of this case. The FORD sank on December 24, 1979. The action

was filed on October 29, 1980. Trial was conducted in January of 1986 and, after three-and-one-half years, the district court rendered its decision in June of 1989. More than 11 years have now passed since the original loss and more than 10 years since the complaint was filed. In similar circumstances, where an appellate court has chosen not to remand to the trial court for additional fact-finding, lesser delays have been cited as part of the rationale for modifying at the appellate level.

In *Felder, supra,* a seven-year-old case, the court stated:

> "Moreover, consideration of the passage of time since the commencement of this litigation compels us to such an early disposition of the matter. A remand could easily lead to a further appeal . . . the interests of justice and the best interest of the parties require that we recalculate the damages on the basis of the record before us and order entry of a modified judgment." 543 F.2d at 671.

In *Chris-Craft Industries, Inc., supra,* where the case was in its sixth year and on its third appeal, the court cited as an additional reason for modification the "extraordinary length of time this litigation has already lingered." 516 F.2d at 186.

E. There is No Deprivation of the City's Right to Appeal

The City argues in its Petition (Pet. 23-24) that, as a result of what it characterizes as modifications of the district court's finding of fact as to liability made by the Court of Appeals, it has been effectively deprived of the

right to appeal from those modified findings. The City's argument incorrectly presumes that the Court of Appeals' decision was merely a substitution of a finding of fact whereas, as previously argued, it was a legal conclusion fixing the Shipowner's liability at the most the law could allow. However, even if arguendo the City's appellate rights have been limited, the argument fails to recognize that such "limitation" is a fact of life in any case on appeal where an appellate court has exercised its authority under 28 U.S.C. § 2106 and modified the findings of a trial court. The City is now doing the same thing in its Petition that the district court did in its Decision. The City argues in its Statement of the Case (Pet. 4) that the Court of Appeals' reapportionment of liability has increased the City's potential liability from a range of approximately $0 - $40,000 to a range of approximately $2 million to $4 million, depending upon how the unresolved damages issues are decided. This is based upon the same damage allocations in the Complaint and Counterclaim upon which the district court erroneously based its apportionment of liability, plus a possible award of prejudgment interest. There is not one scintilla of evidence in the case as to damages because the damage issue was bifurcated and has not even been the subject of discovery to date. There is no basis for the City's statement (argument) just as there was no basis for the district court's statement that the Shipowner had the costlier property at risk when there was no evidence in the record as to the cost or value of any property involved in the case.

In addition, the City had an opportunity to bring this very concern before the Court of Appeals in its Petition

for Rehearing. (Resp. App. 1-21 at 8-12) The issue was considered by the Court of Appeals and rejected (Pet. App. 145a). The City has cited no cases in support of its contention. The argument has neither foundation nor merit.

VI. CONCLUSION

Because the district court misapprehended the underlying law in order to reach its findings of fact with regard to apportionment of liability, the Court of Appeals was left with a clear conviction that the district court had made a mistake and held the 96/4 apportionment of liability to be clearly erroneous; it failed the "dead fish" test. Upon review of the record, the Court of Appeals agreed with the district court that both parties were negligent and that the Shipowner was more negligent than the City. Without touching or changing any other findings of fact, the Court of Appeals reapportioned liability to two-thirds/one-third based on the legal conclusion that no reasonable trier of fact could have assessed more than two-thirds of the fault to the Shipowner. It had the power to do so pursuant to 28 U.S.C § 2106. Faced with that, any subsequent assessment of greater liability against the Shipowner would be unlikely to survive further appeal. It would rest on a record even colder than that which was before the Court of Appeals.

Respondents request that, over eleven years after the fact of accident and almost ten and one-half years after commencement of the litigation, the issue of liability be put to rest with the ship so that the parties can get on

with discovery and trial, if necessary, as to the remaining issue of damages.

Respectfully submitted,

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March 18, 1991

RESPONDENT'S APPENDIX

App. 1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-2631

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 80-C-1001 – Thomas J. Curran, Judge.

PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING IN BANC AND APPENDIX

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TABLE OF CONTENTS

I. The Court Erred By Not Remanding The Case To The District Court For Reallocation Of Fault ... 2

A. Rule 52(a) precludes this court from reallocating fault ... 2

B. An appellate court's authority to reduce or increase damages does not include the authority to reapportion fault ... 4

II. The Finding Of The District Court Allocating Fault Is Not "Clearly Erroneous" ... 7

A. The district court made no error of law in allocating fault ... 7

B. This court did not give due deference to the district court's findings of fact ... 11

CONCLUSION ... 15

APPENDIX ... 100

References in this petition to the various appendices in this case are as follows:

App.	Appendix attached to petition
Sh. App.	Short Appendix filed by appellant
Apl. App.	Separately bound appendix filed by appellant

TABLE OF AUTHORITIES

Federal Cases

Afran Transport Co. v. S/T Maria Venizelos, 450 F.Supp. 621 (E.D. Pa. 1978) 11

Alkmeon Naviera, S.A. v. M/V Marina L, 633 F.2d 789 (9th Cir. 1980) 3

Allied Chemical Corp. v. Hess Tankship Co. of Delaware, 661 F.2d 1044 (5th Cir. 1981) 11

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) ..... *passim*

Aunt Mid, Inc. v. Fjell-Oranje Lines, 458 F.2d 712 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972) 11

Bremmer v. Shedd, 467 F.Supp. 261 (W.D. Pa. 1979) 11

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 516 F.2d 172 (2d Cir. 1975) (en banc), *rev' on other grounds*, 430 U.S. 1, *reh'g denied*, 430 U.S. 976 (1976) 5

Complaint of B.F.T. No. Two Corp., 433 F.Supp. 854 (E.D. Pa. 1977) 11

Complaint of Flota Mercante Grancolombiana, S.A., 440 F.Supp. 704 (S.D. N.Y. 1977) 11

Complaint of Interstate Towing Co., 717 F.2d 752 (2d Cir. 1983) 10

Dale Benz, Inc., Contractors v. American Casualty Co., 303 F.2d 80 (9th Cir. 1962) 6, 7

Felder v. United States, 543 F.2d 657 (9th Cir. 1976) ... 3, 5

Gele v. Wilson, 616 F.2d 146 (5th Cir. 1980) 10

Getty Oil Co. (Eastern Operations), Inc. v. SS Ponce DeLeon, 555 F.2d 328 (2d. Cir. 1977) 10

TABLE OF AUTHORITIES – Continued

Harbor Tug & Barge, Inc. v. Belcher Towing Company, 733 F.2d 823 (11th Cir. 1984) 10

Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987) 4

Helvering v. Gowran, 302 U.S. 238 (1937) 8

Inland Oil and Transport Co. v. Ark-White Towing Co., 696 F.2d 321 (5th Cir. 1983) 10

Insurance Co. v. Piaggio, 83 U.S. (16 Wall.) 378 (1873) 4

Landau v. J.D. Barter Const. Co., 657 F.2d 158 (7th Cir. 1981) 8

McAllister v. United States, 348 U.S. 19 (1954) 2

Mitchell v. Evelyn C. Brown, Inc., 310 F.2d 420 (1st Cir. 1962) 7

Petition of United States Steel Corp., 479 F.2d 489 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973) 5

Portacci v. Moran Towing & Transport Co., 615 F.2d 293 (5th Cir. 1980) 11

Red Star Towing & Transport Co., Inc. v. "Ming Giant", 552 F.Supp. 367 (S.D. N.Y. 1983) 11

S.C. Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) 9

Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 8

Simpson v. United States, 322 F.2d 688 (5th Cir. 1963) 6

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) 10

TABLE OF AUTHORITIES – Continued

United States v. National Assoc. of Real Estate Boards, 339 U.S. 485 (1950) 11

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 2, 10

United States Fidelity & Guaranty Co. v. Jadranska Slobonda Plovidba, 683 F.2d 1022 (7th Cir. 1982) 10

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 3

United States Code

28 U.S.C. § 2106 3

Federal Rules of Civil Procedure

Rule 52(a) 1, 2, 3

Other Authorities

2 *Federal Procedure* L.Ed. § 3:691 (1981) 5

9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2585 (1971) 11

IN THE
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No. 89-2631

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 80-C-1001 – Thomas J. Curran, Judge.

PETITION FOR REHEARING, WITH
SUGGESTION FOR REHEARING IN BANC

This decision should be reheard in banc because it conflicts with decisions of the United States Supreme Court and other courts of appeals. This court's reallocation of fault exceeds the authority granted it by Fed. R. Civ. P. 52(a) and therefore conflicts with *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The decision also applies a new standard, "cost of avoidance," in apportioning fault in admiralty cases, which is at variance with *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and the decisions of other courts of appeals. Moreover,

the decision fails to give the required deference to the findings of the district court, and reaches a decision predicated upon findings not made by the district court. Rehearing is required due to the critical importance of appellate courts adhering to the fundamental limitations on their power. Furthermore, the new standard formulated by this court in apportioning fault in admiralty cases lacks support in law or logic and will interject uncertainty into an area of the law which routinely involves sizeable damages.

This is a suit in admiralty between the owners and insurers of the SS EM FORD and the City of Milwaukee, as wharfinger. During a great northeasterly storm, the FORD, moored in an outer harbor slip, broke loose from its moorings, damaged the City's wharf and sunk in the slip. The district court, in a 140-page decision, found both National Gypsum and the City negligent and contributorily negligent, and allocated fault 96 percent upon National Gypsum and 4 percent upon the City. This court, in an 11-page opinion, reversed the district court and reallocated fault two-thirds upon National Gypsum and one-third upon the City. (App. 1-11). This increased the City's potential liability from a range of approximately $0 to $40,000 to a range of approximately $2 million to $4 million, depending upon how unresolved damages issues are decided.

I. This Court Erred By Not Remanding The Case To The District Court For Reallocation Of Fault.

A. Rule 52(a) precludes this court from reallocating fault.

The decision of the district court apportioning fault 96/4 was a finding of fact.[1] When this court reapportioned fault 2/3-1/3 it made a new finding of fact. This court is precluded from making a new finding reallocating fault by Rule 52(a), Fed. R. Civ. P., because to do so it must conduct what amounts to a *de novo* weighing of the evidence in the record, a procedure this court is not permitted to undertake under Rule 52(a). *Anderson*, 470 U.S. at 573.[2]

Although appellate courts have broad power under 28 U.S.C. § 2106 to modify judgments, the power is delimited by Rule 52(a), Fed. R. Civ. P. *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976). Once an appellate court decides that a finding is "clearly erroneous," it has

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[1] A finding of negligence is a finding of fact reviewable under the "clearly erroneous" standard. *McAllister v. United States*, 348 U.S. 19, 20, 22-23 (1954). In reviewing the apportionment of negligence under comparative negligence principles, the court is merely reviewing two findings of negligence rather than one. Accordingly, courts have consistently done so under the "clearly erroneous" standard. *E.g., Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 796 (9th Cir. 1980).

[2] Prior to the decision in *McAllister v. United States*, 348 U.S. 19 (1954), appellate courts had the power to conduct *de novo* review in admiralty cases. In *McAllister*, the Court held that admiralty cases tried without a jury must be reviewed in accordance with Rule 52(a).

no authority to reweigh the evidence and replace that erroneous finding with its own finding.

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson at 573 (quoting in part *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). The rationale for the limitation is plain:

> The trial judge's major role is the determination of fact, and with experience in fulfulling [sic] that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 574-75.

Accordingly, the Court in *Anderson* held that Rule 52(a) not only precludes appellate courts from reweighing the evidence, but also from conducting its review in a manner that is tantamount to a *de novo* weighing of the evidence. The Court reversed because "the Fourth Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record." *Id.* at 576.

B. An appellate court's authority to reduce or increase damages does not include the authority to reapportion fault.

There is no well-reasoned precedent for this court's reapportionment of fault in an admiralty case. Only in

Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987), did an appellate court reverse a district court's finding of fault and reapportion fault. The decision does not provide well-reasoned precedent for this court's decision. The Fourth Circuit based its authority to reapportion fault upon this premise: "this court may apportion liability, provided no further fact finding is necessary for the reapportionment." *Id.* at 638. The premise is a contradiction because the reapportionment itself is a new finding of fact.

The precedent cited in *Hellenic Lines, Ltd.* does not support the proposition that an appellate court may reapportion fault. The cases cited concerned adjustments in the amount of damages awarded; none concern or approve reapportionment of fault on appeal. In *Insurance Co. v. Piaggio*, 83 U.S. (16 Wall.) 378 (1873), the Court deducted from the judgment the amount of damages erroneously allowed. In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2d Cir. 1975) (en banc), *rev'd on other grounds*, 430 U.S. 1, *reh'g denied*, 430 U.S. 976 (1976), the court held that it had the authority to modify the judgment to increase the award of compensatory damages because (1) the critical evidence was largely documentary, *Id.* at 186, and (2) the court could do so without having to evaluate the testimony of witnesses. *Id.* at 186 n.16. In *Felder*, 543 F.2d at 67, the court confined its modification to a recalculation of damages under circumstances where most of the changes made involved arithmetic calculations that the appellate court could perform as easily as the trial court.

The Fourth Circuit also cited 2 *Federal Procedure* L. Ed. § 3:691 (1981) as authority, but this section only

recites the holding in *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973), that if an appellate court finds that a damage award by a trial judge is clearly erroneous because it is excessive, it cannot under Rule 52(a) exercise its independent judgment and reduce the award to a level that it feels is appropriate, but can only reduce the damages to a level that would not have mandated reversal, had the trial court awarded that amount of damages originally. 2 *Federal Procedure*, at 639; *United States Steel*, at 501.

The rationale permitting an appellate court to reduce damages is inapplicable to the reapportionment of fault. When the plaintiff's damages are reduced to the amount that could have been awarded without constituting error, the plaintiff has no cause to complain because the plaintiff, although his or her damages are reduced, has received all that the district court could have awarded, and the defendant is liable for less than the district court had awarded. When an appellate court reduces the plaintiff's degree of fault, the opposite occurs: the plaintiff, rather than receiving less than the district court had awarded, receives more, and the defendant, rather than paying less, pays more. The defendant is therefore required to pay more damages by an appellate court that has not heard the evidence firsthand and is not permitted to re-weigh the evidence.

The authority of an appellate court to increase damages under limited circumstances does not provide authority for reapportionment of fault because damages are quantified or quantifiable, and therefore, susceptible to adjustment by calculation. When courts have increased damages, they have done so when they were assured that

they were not undermining the integrity of the trial process. For example, in *Simpson v. United States*, 322 F.2d 688 (5th Cir. 1963), the court increased the damages when it found that "there are firm guidelines establishing the basic elements of the award and it can be computed with some degree of certainty as easily by the appellate court as by the trial judge . . . " *Id.* at 693. In *Dale Benz, Inc., Contractors v. American Casualty Co.*, 303 F.2d 80 (9th Cir. 1962), the court increased the damages where it was "in as good a position to determine the issues involved on the record before us as would be the trial judge on remand," and the "issues arise out of and are concerned with figures and arithmetical calculations." *Id.* at 82.

When an appellate court increases the amount of damages under these circumstances, neither party is harmed. The plaintiff receives a larger award than had been granted by the trial court and the defendant is liable for the same additional amount he or she would have been liable for if the trial court had recalculated damages on remand. Apportionment of fault, on the contrary, has no quantifiable component readily subject to recalculation, but is dependent upon the application of law to facts which are as rich and diverse as human experience. This exercise of judgment is more accurately done by the trier of fact because "[c]old records rarely reflect the look, the touch or the feel of the witness. . . . " *Mitchell v. Evelyn C. Brown, Inc.*, 310 F.2d 420, 425 (1st Cir. 1962). The difficulty of accurately judging fault based upon oral testimony given in the district court is well illustrated, as discussed below, in this case.

II. The Finding Of The District Court Allocating Fault Is Not "Clearly Erroneous".

A. The district court made no error of law in allocating fault.

Although this court described the district court's opinion as "thorough and largely well-reasoned" and "basically correct," it found that the district court's allocation of fault was clearly erroneous. This court did not find that any finding of fact or conclusion of law relied upon by the district court in making its allocation of fault was clearly erroneous. Rather, this court concluded that the district court might have apportioned liability according to the amount of property each side had at risk. It based this conclusion upon a single statement of the district court in its discussion of foreseeability that National Gypsum had the costlier property at risk and upon the fact that the apportionment approximated the alleged value of property at risk. This court held that it could not accept the district court's apportionment of fault because it was either arrived at by an incorrect application of comparative negligence principles, or because the district court failed to adequately explain how it arrived at the allocation of fault. If this court found that it could not identify the assumptions upon which the district court acted, then it should remand the case for clarification.[3] The 140-page decision of the district court, however, more than adequately

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[3] "A case should be remanded when it is impossible to define the assumptions upon which the district court acted." *Landau v. J.D. Barter Const. Co.*, 657 F.2d 158, 164 n.12 (7th Cir. 1981).

explains its apportionment of fault. This court should have limited its review to a determination of whether the district court's allocation of fault was clearly erroneous in light of the record as a whole.[4]

When this court stated that "a party's share of liability should not depend upon how valuable his property at risk was," it apparently held that the value of the property of the respective parties at risk should not be considered in apportioning fault. The district court, however, stated that the standard it applied in allocating fault was culpability. It further stated, relying primarily upon *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166-68 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980), that the adoption of the comparative negligence doctrine did not abolish the doctrine of contributory negligence in admiralty, but instead, merged the doctrine of contributory negligence into the doctrine of comparative negligence. Contributory negligence, unlike ordinary negligence, does not involve a breach of any duty owed to others, but the failure to reasonably safeguard one's own property. The district court found both National Gypsum and the City contributorily negligent. (Sh. App. 77-78). In light of the merger of the contributory negligence doctrine into the comparative negligence doctrine,

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[4] Even if the district court relied upon a wrong ground in arriving at its decision, that in and of itself does not justify reversal. It is a settled rule of law that in reviewing a decision of a lower court, the appellate court must affirm if the result is correct, "although the lower court relied upon a wrong ground or gave a wrong reason." *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943), (*quoting, Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

it cannot be said unequivocally, as this court did without citation to authority or discussion of the finding of contributory negligence, that the value of the respective party's property at risk should not be a valid consideration in deciding the relative culpability of the parties when they failed to safeguard their own property.

This court held, without citation of authorities, that "the doctrine of comparative negligence is generally supposed to be used to assess liability in proportion to the cost of avoiding the entire accident to each side." The notion that the burden of precaution, or to restate it in economic terms, the cost of avoidance, is a factor to be considered in the negligence context was suggested in the decision of Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The "Hand formula," however, was limited to assisting the court in determining whether action or inaction constituted negligence. This court, in *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982), approved the use of the "Hand formula" to determine whether conduct was negligent, but did so with the caveat that it was not holding that courts must use the "Hand formula" to determine negligence in all maritime cases.

In *Reliable Transfer Co.*, 421 U.S. at 411, the Court held "that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . . . " Under this standard, fault is apportioned in accordance with the relative culpability of the parties. *Harbor Tug & Barge, Inc. v. Belcher Towing*

Company, 733 F.2d 823, 825 (11th Cir. 1984); *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980).

No court has used the "cost of avoidance" analysis advocated by this court to apportion fault in an admiralty case. Numerous federal appeals courts have reviewed apportionments of fault by district courts without any reference to or consideration of the cost of avoidance. *See, for example, Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983); *Complaint of Interstate Towing Co.*, 717 F.2d 752 (2d Cir. 1983); *Getty Oil Co. (Eastern Operations), Inc. v. SS Ponce DeLeon*, 555 F.2d 328, 335 (2d Cir. 1977), *Portacci v. Moran Towing & Transport Co.*, 615 F.2d 293 (5th Cir. 1980); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1057 (5th Cir. 1981). In addition, numerous district courts have allocated fault or reviewed allocations of fault by juries in admiralty cases without reference to or consideration of the "cost of avoidance." *Red Star Towing & Transport Co., Inc. v. "Ming Giant"*, 552 F.Supp. 367 (S.D. N.Y. 1983), *Complaint of Flota Mercante Grancolombiana, S.A.*, 440 F.Supp. 704, 726 (S.D. N.Y. 1977), *Bremmer v. Shedd*, 467 F.Supp. 261, 267 (W.D. Pa. 1979), *Afran Transport Co. v. S/T Maria Venizelos*, 450 F.Supp. 621, 623 (E.D. Pa. 1978), *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854, 875 (E.D. Pa. 1977).

B. This court did not give due deference to the district court's findings of fact.

An appellate court must accept the findings of the district court unless they are without adequate evidentiary support. 9 C. Wright & A. Miller, *Federal Practice and*

Procedure § 2585 (1971). Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson*, 470 U.S. at 574. The appellate court is not to give the facts another construction or resolve the ambiguities differently from the district court. *United States v. National Assoc. of Real Estate Boards*, 339 U.S. 485 (1950). An appellate court must take that view of the evidence and the inferences deducible therefrom which is most favorable to the party prevailing below. *Aunt Mid, Inc. v. Fjell-Oranje Lines*, 458 F.2d 712, 718 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972).

This court did not give due deference to the district court's findings concerning the knowledge of National Gypsum and its captain of Milwaukee's harbor. This court stated that National Gypsum was "aware" of the regulations which prohibited winter mooring in Milwaukee's outer harbor because of the dangers of wave surges from northeasterly winds, and that National Gypsum had been "informed" in December of 1979 that ships berthed in Milwaukee's outer harbor were subject to heavy surges during storms with northeasterly winds. This court then stated that the district court "thought" that the FORD's captain could have predicted the possibility of wave surges based on the construction of the berth and his experience in general. These characterizations hardly view the district court's findings in the light most favorable to the City and make an unwarranted distinction between what the captain knew and what the captain's employer knew. The district court found (1) that the FORD's captain "knew or should have known of any dangers which could have developed due to wind and wave action" in Milwaukee's outer harbor and South Slip

No. 1 due to his training and experience as a Great Lakes ship master and his experience with similar harbors, (Sh. App. 22), (2) that the opening in the breakwall directly northeast of South Slip No. 1 was an "open and obvious" condition, and that the slip had little breakwall protection from wave action from the northeast, (Sh. App. 23), (3) that National Gypsum knew that Milwaukee's outer harbor was subject to heavy surges during storms with northeasterly winds, and (4) that National Gypsum was warned of the danger in reference to the mooring of the FORD at that location. (Sh. App. 17). National Gypsum's culpability should not be reduced because its captain might not have known of the information known to and the warning received by National Gypsum.

The court's characterization of the district court's findings regarding the City inaccurately describes the actions and knowledge of the City. This court stated incorrectly that "the City failed to warn" the FORD or National Gypsum "of any possible danger to the FORD." In fact, the district court found that when the FORD's captain informed Blawas of the ship's need to remain in Milwaukee, Blawas "warned that the outer harbor could get 'heavy' if a storm came up" and suggested that the FORD tie up at a berth in the inner harbor. (Sh. App. 28-29). The district court concluded, however, that the warning given by the City was inadequate and misled the captain. (Sh. App. 95, 110). There is a considerable difference between no warning, as found by this court, and an inadequate warning in the context of a conversation between a dock superintendent and the captain of a vessel. Any kind of warning to a ship's captain of danger to his ship places upon the captain the duty of further

inquiry. (Sh. App. 57-58). If the captain relied solely upon the warning of Blawas, then the captain was negligent in doing so. (Sh. App. 59, 128).

This court further found that on the morning of December 22, 1979, the captain of the FORD informed Blawas that "most of the crew would be gone until December 26th or 27th, but that a skeleton crew would be left aboard the FORD during the interim." This finding conflicts with the district court's finding that the captain of the FORD stated only that "part of the crew would go home for the holiday." (Sh. App. 28). This court's misstatement of the evidence charges the City with greater knowledge of the make-up of the remaining crew than found by the district court. The district court specifically found that the City was not fully informed of the undermanning of the FORD when it noted that "unbeknownest to the City – the entire crew was being discharged and the captain was going on vacation." (Sh. App. 94, n.29).

The portion of Blawas' conversation with the captain relied upon by this court in making its finding that the City failed to warn the FORD was considered by the district court in the context of the record as a whole, and not in the isolated fashion it was apparently considered by this court. (Sh. App. 29). Viewing the conversation in light of the record as a whole, its significance diminishes considerably. The captain did not call Blawas to the ship; Blawas was on the ship by chance on other business. (Sh. App. 28, 93). The captain called Blawas forward to discuss access to shore power; the discussion of weather was an aside. (Sh. App. 151). The conversation was general; nothing in the record indicates that the captain specifically solicited Blawas' opinion as to whether the FORD,

virtually unmanned, could ride out a large storm from the northeast in Slip No. 1. The captain was anxious to go home for the holidays. (Sh. App. 23). He was unreceptive to the "heavy" weather warning and did not question Blawas further. (Sh. App. 94).

This court did not view the evidence in a light most favorable to the City. It ignored the description of the conversation as a warning given by the impartial witness, Heckl. (Sh. App. 95). It gave greater weight to what Blawas might have meant when he told the captain that waives in the outer harbor could "get a little rough," than to his testimony that he assumed the captain was experienced and knew the weather conditions on Lake Michigan. (Apl. App. 152) Blawas' assumption was warranted because he was speaking with an experienced Great Lakes master who had entered the Port of Milwaukee thirty to forty times during his career. (Sh. App. 22, 26).

CONCLUSION

This court should grant the City's petition for rehearing and either affirm the order of the district court or, in the alternative, remand the case to the district court for reapportionment of fault.

Dated and signed at Milwaukee, Wisconsin this 30th day of October, 1990.

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